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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 71-1461

EDMOND CADOUX, *Petitioner*

v.

PLANNING AND ZONING COMMISSION OF THE TOWN OF WESTON, CONNECTICUT, *Respondent*

On Petition for a Writ of Certiorari to the Supreme Court of the State of Connecticut

---

BRIEF FOR RESPONDENT IN OPPOSITION

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BRIEF FOR RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the Supreme Court of the State of Connecticut (App. 1 of Petition) and the opinion of the Court of Common Pleas of the State of Connecticut (App. 2 of Petition) are adequately set forth in the Petition.

JURISDICTION

This Court has no jurisdiction under 28 U.S.C. Section 1257 (3).

This Court is without jurisdiction to decide federal questions not properly raised nor decided in the State Court. *Adler* v. *Board of Education,* 342 U.S. 485, 496 (1952); *Wilson* v. *Cook,* 327 U.S. 474, 483-4 (1946); *Whitney* v. *California,* 274 U.S. 357, 362-3 (1927); *Dewey* v. *Des Moines,* 173 U.S. 193, 197-8 (1899).

Petitioner failed to raise anywhere in his pleadings and, the Court below did not decide the federal questions presented in the Petition.

Petitioner relies on paragraphs C through G of the allegations in the complaint and paragraphs 76 through 83 of his claims of law to the Court of Common Pleas and to the Supreme Court of the State of Connecticut to invoke the jurisdiction of the Court. (Petition for a Writ of Certiorari to the Supreme Court of the State of Connecticut, pp. 5-6; "Pet." hereinafter) Yet, none of the quoted allegations or claims of law relate to the federal questions which Petitioner presents.

For example, paragraph C is the only paragraph quoted from the complaint which even mentions the United States Constitution. It is obvious that the narrow issue framed by said paragraph as to whether the denial of Petitioner's application to amend the zoning regulations is tantamount to a taking without due process of law, bears little resemblance to the much broader and serious issues raised by the Questions Presented.

Secondly, it is unclear and Petitioner leaves to speculation whether in paragraphs D and E he is asserting

rights guaranteed by Article 1, Sections 1 and 8 of the Constitution of the State of Connecticut or rights guaranteed by the United States Constitution. "* * * the fact that a federal question lurks in the case doesn't mean, standing alone, that a state decision will be reviewed." Mr. Justice Brennan, *State Court Decisions and the Supreme Court,* 31 Penn Bar Ass'n, Q. 393, 399 (1960). On the other hand, it is perfectly clear that paragraphs F and G claim only violations of the "statute law of the State of Connecticut." (Pet. 5-6).

Equally important is the very basic fact that Petitioner chose to present the so-called federal issues of "confiscation" and "denial of just compensation" to the Supreme Court of the State of Connecticut as purely evidentiary rather than constitutional questions. In his brief to the Court below, Petitioner framed the issues as follows:

> "4. Did not the Court err in refusing to hear evidence as to whether denial of the plaintiff's application was confiscatory to his land?
>
> "5. Did not the Court err in refusing to hear evidence as to whether the denial of the application was tantamount to a taking of the plaintiff's property without just compensation?"[1]

Accordingly, Respondent respectfully submits that Petitioner failed to properly raise below the federal Questions Presented and this Court is without jurisdiction.

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[1] Brief of the Plaintiff-Appellant, p. 2, *Edmond Cadoux* v. *Planning and Zoning Commission of the Town of Weston,* 33 Conn. Law J. 35.

QUESTIONS PRESENTED

A. The only question decided by the Supreme Court of the State of Connecticut—on nonfederal grounds—was:

Whether under the particular factual circumstances of this case, Respondent zoning commission acted unreasonably in denying Petitioner's application to amend the zoning regulations to permit the use of his property for a neighborhood shopping center, when such denial leaves the town—as it was before the application was filed—with a residential-farm zone encompassing the entire municipality.

The Court ruled that on the facts it could not say that Respondent "was unreasonable or that it failed to consider the needs of the community" (Pet. 14).

B. As Respondent has noted, pp. 2-3, *supra*, the Questions Presented in the Petition are not involved in this case, and were not presented or decided by the Court below.

In addition, while Questions Presented 1 and 2 are predicated upon the "action of a political subdivision" of the State, Petitioner fails to specify precisely what action was taken which *resulted* in the exclusion of the great majority of businesses from the entire territorial limits of the town and what action was taken which *resulted* in limiting the use of land to single family homes on lots of a minimum of two acres. In fact, the only action taken by the Respondent was to deny Petitioner's application to amend the zoning regulations. It certainly does not follow that such action resulted in the "exclusions" and "limitations" posed by questions 1 and 2.

The very foundation of the Questions Presented is a *non sequitur* and demonstrates Petitioner's total lack of understanding of the nature of his case.

To take but one further example of this misunderstanding: Petitioner would have this Court believe from Question 2 (Pet. 2) and his argument (Pet. 8) that two acre zoning was an issue in the Court below. This is far from the truth for the record shows that the zoning amendments which Petitioner submitted to the Respondent for enactment and which he prayed the trial court and Supreme Court of the State of Connecticut to order the Respondent to adopt, specifically propose a minimum lot area of two acres throughout the entire town of Weston. (Appendix 1, p. 5a).

Extraordinary as it may be, Petitioner seeks to smuggle into this Court, issues foreign to the case. In the abstract the Petition may present "intellectually interesting and solid problems. But this Court does not sit to satisfy a scholarly interest in such issues." *Rice* v. *Sioux Cemetery*, 349 U.S. 70, 74 (1955).

CONSTITUTIONAL PROVISIONS INVOLVED

1. Article 1, Sec. 1 of the Connecticut Constitution"

Sec. 1. All men when they form a social compact, are entitled to exclusive public emoluments or privileges from the community.

2. Article 1, Sec. 8 of the Connecticut Constitution:

Sec. 8. "* * * No person shall be compelled to give evidence against himself, nor be deprived of life, liberty or property without due process of law, nor shall excessive bail be required nor excessive fines imposed. * * *"

STATEMENT

This litigation concerns a statutory appeal from the denial of Petitioner's application to the Respondent, to amend the zoning regulations of the Town of

Weston, Connecticut. The Petitioner's application dated May 17, 1967, sought to amend the Weston zoning regulations by creating a shopping center zone which not only included Petitioner's property but also the adjacent existing shopping center. The amendments which were "designed to account for the local shopping need but also to preserve current form and context of the Regulations"[2] sought to include the permitted uses already in existence under the regulations with slight modifications to account for the suggested shopping center facilities. (Appendix 1). Section 5 of the Petitioner's regulations (Appendix 1, p. 5a) like section 5 of the existing regulations (Pet. 30) sought to limit the size of lots throughout the town to a minimum of two acres. In addition, petitioner not only proposed to retain the prohibited uses of the existing regulations but also to include an additional prohibited use. (Appendix 1,.p. 5a).

After a full public hearing, and a view of the proposed site of the new shopping center facilities by all the members of the commission, Petitioner's application was denied. Respondent gave the following five separate reasons, which the trial court and Supreme Court of the State of Connecticut found to be supported by the record:

> "1. The requested zone change is not in conformity with the comprehensive zoning plan of the Town of Weston.
>
> 2. Applicant has not proved that any changes have occurred which have substantially altered the character of the area.

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[2] Exhibit 10, Booklet-Weston Center-A plan for Community shopping Facilities, Weston, Conn. by Bryan & Panico, consultants for Petitioner, *Edmond Colonx* v. *Planning and Zoning Commission of the Town of Weston*, 33 Conn. Law J. 35.

3. The applicant has not proved that the changes sought would further the public welfare.

4. The applicant has not proved there is sufficient need for the proposed uses so as to benefit the Town in general.

5. Route 57 (Weston Road) in the area of the proposed change is a two lane roadway, one travel lane in each direction. Going north adjacent to applicant's property this road curves to the east and then to the west. The increased traffic would present a hazard at this point in view of the width and curvature of this road and in its location opposite the entrance to the schools and school bus garage." (Pet. 20)

The Court below concluded that:

"The town of Weston is on the periphery of other larger metropolitan centers. The Weston shopping center, although its use is nonconforming under the present zoning regulations, contains the post office, a service station, a food market, a dry cleaner, a package store, a hardware store, a hobby store, a real estate office, a drygoods store, a bank, a drugstore and a luncheonette. On these facts we cannot say that the defendant commission was unreasonable or that it failed to consider the needs of the community. We note also that among the reasons given by the defendant for the denial of the plaintiff's application was the finding that the 'increased traffic would present a hazard in view of the width and curvature of the road and in its location opposite the entrance to schools and school bus garage.' The trial court's ruling was correct.

As to the remaining assignment of error, an examination of the memorandum of decision of the trial court indicates that the claims of the plaintiff were thoroughly cosidered and correctly determined. No further discussion by this Court is required." (Pet. 14)

ARGUMENT

I

There Are No Substantial or Important Reasons for Granting the Petition

Petitioner fails to show any substantial or important reasons for granting the petition. Petitioner makes no attempt to delineate precisely what the grounds for granting his petition are. Instead, he resorts to facts from a census—admitted by him not to be in the record—(Pet. 8-9) and, relies on the listing of such remote improbable analogies as "the fundamental right of all citizens to travel freely between the states and settle therein" (Pet. 7); the exclusionary effect of two acre zoning on minority and disadvantaged groups (Pet. 8) and "bussing for racial balance and of the unequal educational opportunity provided by public school systems" (Pet. 10). These references reflect no more than Petitioner's own rhetoric. The pleadings, record on appeal and decision of the Court below will be searched in vain for any such issues.

There exists no substantial reason for granting the Petition because the decision of the Court below can affect only the Petitioner. "This Court does not sit * * * for the benefit of particular litigants." *Rice* v. *Sioux City Cemetery,* 349 U.S. 70, 74 (1955). Whenever "review would be of no importance save to the litigants themselves" the Writ of Certiorari should not be granted. *Rudolph* v. *United States,* 370 U.S. 269, 270 (1962).

Before the decision of the Court below was announced, the Town of Weston amended its zoning regulations, effective December 15, 1970, by *inter alia,* establishing a neighborhood shopping center zone. The

shopping center zone did not include Petitioner's property but did encompass the existing shopping center facilities adjacent thereto.[3] The new regulations, which are presently in force, permit substantially the same uses of property within said zone as Petitioner sought in his 1967 application to amend the regulations. (Appendix 2; Appendix 1, p. 4a).

Accordingly, the decision of the Court below can only affect the litigants and the issues raised are not worthy of consideration by this Court.

In addition, the Petition is not worthy of consideration because it raises questions which the Petitioner claims to be presently litigating in the lower courts of the State of Connecticut.

In April 1969, prior to the decision of the Court of Common Pleas in this case, Petitioner commenced a declaratory judgment action in the Superior Court at Bridgeport, Connecticut.[4] In his amended complaint, Petitioner alleges, in paragraph 11 that:

> "Said regulations are invalid and void for the reasons that they are in direct violation of the Constitutions of the State of Connecticut and the United States * * * in that said regulations fail to set up a reasonable classification of lawful businesses and of minimum lot sizes within the

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[3] Petitioner is presently pursuing his statutory right to appeal the decision of the Respondent excluding his property from the boundaries of the neighborhood shopping center district. *William E. Coprio, et al.* v. *Planning & Zoning Commisison of the Town of Weston*, Docket No. 95857, Ct. of Common Pleas, Fairfield County at Bridgeport, Conn.

[4] *Edmond Cadoux* v. *Planning & Zoning Commisison of the Town of Weston*, Docket No. 36064, Superior Court, Fairfield County at Bridgeport, Conn.

> entire community; in that it arbitrarily and unreasonably interferes with the right of individuals to carry on lawful business within said Town by prohibiting the use of any land for a great majority of lawful businesses within said community; and in that it arbitrarily and unreasonably denies the use of land within the community for residential purposes by excluding therefrom persons of lower economic classes."

Respondent submits that since Petitioner is actively seeking relief in the State courts, the case is not yet ripe for review by this Court and a decision at this juncture would be tantamount to an advisory opinion.

Petitioner mistakenly asserts that "the decision of the Connecticut Supreme Court is clearly not in accord with the holding of this Court in *Village of Euclid* v. *Ambler Realty Co.*, 272 U.S. 365." (Pet. 9) Petitioner attempts to rewrite the *Euclid* decision by arguing that approval of the Village of Euclid zoning regulations which excluded all business uses from a residential zone, was "clearly predicated upon such uses being allowed *somewhere* within the community." (Pet. 9)

A reading of the *Euclid* case fails to disclose any such holding or intendment.

This Court did say—as the Court below noted—that "the reasonableness of a zoning ordinance must be judged by the circumstances of each particular case." (Pet. 14)

> "The ordinance now under review and all similar laws and regulations must find their justification in some aspect of the police power, asserted for the public welfare. The line which in this field separates the legitimate from the illegitimate as-

> sumption of power is not capable of precise delimination. It varies with circumstances and conditions. A regulatory zoning ordinance, which would be clearly valid as applied to the great cities, might be clearly invalid as applied to rural communities." *Euclid* v. *Ambler Realty Co.*, 272 U.S. 365, 388 (1926).

The Court below held that under the circumstances and conditions existing at the time Petitioner submitted his application, Respondent did not act unreasonably by denying said application, thereby leaving the zoning regulations unchanged. The ruling of the Court below was entirely consistent with the *Euclid* case and Petitioner's reliance thereon is misplaced.

II

The Decision Below Is Obviously Correct

The thrust of the petition is that the case was wrongly decided and the judgment below should now be reversed for the benefit of Petitioner. The short answer is that even if this particular decision were in error, "this Court does not sit * * * for the benefit of particular litigants." *Rice* v. *Sioux City Cemetery*, 349 U.S. 70, 74 (1955).

Moreover, far from being wrong, the decision below is obviously correct. The Petitioner had the burden of proving to the satisfaction of Respondent, the trial court and the Court below that the proposed amendments to the zoning regulations were warranted and would be in the best interests of the community. This he failed to do.

The decision is firmly based upon the facts in the record, most of which were elicited from Petitioner's

expert on town planning. For example, the trial court noted that:

> "Plaintiff's expert stated to the defendant commission concerning the existing shopping center: 'Yet, for a town of your size it is a complete center, it has all the aspects of a good center of town.' Thus the defendant commission reasonably could conclude that the changes sought would not further the public welfare or that there was sufficient need for the proposed uses so as to benefit the town in general." (Pet. 20-21)

In an attempt to persuade the Court that the case below was decided incorrectly, Petitioner dwells upon the testimony and conclusions of his traffic engineer. (Pet. 4-5). He fails to mention, however, that there was testimony from other individuals about the traffic hazards which would be created if the present shopping center facilities were expanded and that the Respondent viewed the premises included in the proposed change. Petitioner also overlooks a very basic principle of law that the testimony of his expert was subject to the test of credibility and may have been accepted or rejected by the Respondent, trial court and the Supreme Court of the State of Connecticut in whole or in part. *National Folding Box Co.* v. *City of New Haven,* 146 Conn. 578, 586, 153A2d 420; *Van Detti* v. *Parsons Bros. Inc.,* 146 Conn. 282, 286, 150 A2d 200.

In addition, the decision of the Court below was based upon principles of law clearly enunciated by this Court in *Euclid* v. *Ambler Realty Co.,* 272 U.S. 365 (1926); the United States Court of Appeals for the Sixth Circuit in *Valley View Village, Inc.* v. *Proffet,* 221 F.2d 412 (6th Cir.); the Supreme Court of Minnesota in *Connor* v. *Township of Chanhassen,* 249 Minn. 205, 81 N.W. 2d 789; the New York courts

in *Old Westbury* v. *Foster,* 193 Misc. 47, 83 N.Y.S.2d 148[5] and a prominent authoritative text on the law of zoning. (Pet. 13-14).

On the basis of the evidence in the record, the Supreme Court of the State of Connecticut had no reasonable alternative but to affirm the decision of the lower court and the decision of the Respondent.

CONCLUSION

For the foregoing reasons, it is submitted that the Petition for a Writ of Certiorari to the Supreme Court of the State of Connecticut be denied.

Respectfully submitted,

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May 29, 1972

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[5] The following cases are also directly in point: *McDermott* v. *Village of Calverton Park,* 454 S.W.2d 577 (Mo. 1970); *Blank* v. *Town of Lake Clarke Shores,* 161 So. 2d 683 (Fla. 1964); *Gautier* v. *Town of Jupiter Island,* 142 So. 2d 321 (Fla. 1962).

APPENDIX 1

Sections 3, 4, 5 and 7 of Petitioner's Proposed Amendments to the Weston Zoning Regulations

A. It is proposed to amend SECTION 3—DISTRICTS by deleting the existing provisions and substituting the following:

SECTION 3—DISTRICTS

For the purpose of these regulations, the Town of Weston is hereby divided into a Residential and Farming District and a Town Shopping Center District. These Districts are delineated and are a part of the comprehensive plan of zoning as follows:

(a) *Residential and Farming District:* The Residential and Farming District is designed to provide primarily for rural residential development appropriate for the conditions characteristic of the Town and encompasses farms, woodland, water supply reservations and open space and conservation areas. The District encompasses the entire Town of Weston outside of any Town Shopping Center District.

(b) *Town Shopping Center District:* The Town Shopping Center District is designed to provide for retail business and office development necessary for local service as part of an established center of the Town where community activities are conducted. The boundaries of the District are shown on a map entitled "Town Shopping Center District, Town of Weston, Connecticut" dated May 1, 1967, which map is hereby declared to be a part of these regulations.

B. It is proposed to amend SECTION 4—PERMITTED USES by deleting the existing provisions and substituting the following:

SECTION 4—PERMITTED USES

No building, structure or premises shall be built, erected, altered, used, arranged or designed to be used except for

one or more of the following purposes specified as permitted in the District where the bidding, structure or premises, or part thereof, is located:

(a) *Residential and Farming District:*

(1) A dwelling house with the customary accessory buildings for the use of occupants, such as a private garage; barn, poultry house, farm buildings necessary for farming or truck gardening; green houses and other similar and incidental buildings necessary to nursery gardening; and roadside stands for the display and sale of farm and nursery produce raised on the premises adjoining such stands; PROVIDED, HOWEVER, that no structure which is not being used as a dwelling house or for residential purposes shall thereafter be used as a dwelling house or for residential purposes unless such structure and use is in all respects in compliance with the requirements of these Regulations.

(2) Customary home occupations carried on by the residents, including business or professional offices or home industries or home services employing not more than three persons not resident on the premises, provided that such occupations or industries create no noise, odor or unsightly condition noticeable off the premises. Such uses shall not include the sale of objects not made on the premises nor a restaurant or tea room.

(3) Farming, forestry, truck gardening, nursery produce raised on the premises.

(4) Church, parish house, Sunday school, public school, public museum, Town recreational buildings, playgrounds, public or private libraries, community buildings, public park or any philanthropic, educational and religious use by a recognized and duly organized non-profit body or

governmental unit, other than a camp, hospital, asylum or correctional institution.

(5) The leasing of rooms and the taking of boarders by owner occupants; PROVIDED, HOWEVER, that not over six roomers or boarders are thus accommodated and PROVIDED FURTHER, that nothing in this Section shall be construed to permit tourist cabins, trailer camps, apartments, hotels, inns, taverns or roadhouses.

(6) 'For Sale' and 'To Let' signs advertising the premises or tract on which such signs are located, signs erected by town, county, state or federal governmental agencies in connection with traffic control or governmental operations, signs advertising goods or produce made or raised on the premises on which such signs are located, and signs bearing the name and occupation of a person and located on the premises where such person resides, and signs bearing the name only of a person and located on a road serving the premises where such person resides: PROVIDED, HOWEVER, that no more than two such signs shall be located on any premises in conjunction with which the same area used, and PROVIDED FURTHER, that no such sign shall be larger than 16 square feet in area and that no moving or flashing signs or signs illuminated in colored lights shall be permitted.

(7) A bona fide non-commercial membership club.

(8) A guest house, which shall be defined for the purposes of this regulation as a detached accessory building located on the same plot or lot with the main building and in all cases to be sold, transferred or conveyed together with said main building as one piece of property; said guest house to be used solely by temporary guests of the occupants of the premises and for

the use of which no rental or other charge is made or received; and such guest house to have no kitchen or cooking facilities and to consist of no more than two (2) rooms exclusively of a lavatory or bath.

(b) *Town Shopping Center District:*

(1) Stores and other buildings where goods are sold or service is rendered primarily at retail.

(2) Business and professional offices; banks and other financial institutions.

(3) Restaurants and other food service establishments where customers are served only when seated and within an enclosed buildings. Such uses, however, may include a food take-out service incidental to the primary permitted use.

(c) *All Districts:*

(1) Removal from the premises of top soil, or removal from the premises of sand, gravel or stone as part of a bona fide construction or grading operation to be completed within a reasonable time and provided that no damage is done to the landscape and that no substantial impairment of scenic beauty results from such operations. Before commencing work on any such removals, a notice in writing must be filed with the Planning and Zoning Commission describing the nature and extent of such removal operations and the person performing such work shall not proceed with the same until notified by the Planning and Zoning Commission in writing that it is permissible to do so. In determining what action should be taken with respect to said notice, the Planning and Zoning Commission may require that a contour map, prepared and certified substantially correct by a registered land surveyor showing the existing contours of

the property involved and the contours of said property after such removals have been completed, be filed with the Commission together with a detailed written description indicating the nature and extent of such construction or grading operations, the dates on which the various stages of said operations will be completed including the date of final completion, and a bond or other security in such form and amount as shall be specified by said Commission to insure compliance with the contour map thus filed and the plan for said operations as contained in said written description. Said data may be required by the Commission as a condition for permitting such operations under this subsection of these Regulations, in any case where the same is found necessary by the Commission to enable proper administration of this subsection.

C. It is proposed to amend Paragraphs (a) and (d) of SECTION 5—AREA AND LOT REGULATIONS by deleting the existing provisions and substituting the following:

SECTION 5—AREA AND LOT LINE REGULATIONS

(a) No lot shall have an area of less than two (2) acres exclusive of any area reserved for or used as a road or right-of-way.

(d) No structure shall be erected within 30 feet from any side or rear lot line, and in addition, in the Town Shopping Center District within 30 feet of any Residential and Farming District boundary line. In the Town Shopping Center District no structure shall exceed a height of 35 feet.

D. It is proposed to amend SECTION 7—PROHIBITED USES by adding the following prohibited uses:

(dd) establishments intended primarily for motor vehicle washing; and establishments for the sale or rental of new or used motor vehicles or trailers.

APPENDIX 2

Sections 200, 322.1, 322.2 and 322.3 of the Zoning Regulations of the Town of Weston, Connecticut

As Amended to December 15, 1970

ARTICLE II—ESTABLISHMENT OF DISTRICTS

Section 200. Classes of Districts and Purposes

Inasmuch as the character and type of development throughout the Town is predominantly rural residential, supplemented by a limited amount of business and service establishments for the convenience of local residents, and based upon the rugged nature of the Town's topography, and the policies expressed in the adopted Town Plan of Development, the Town of Weston is hereby divided into the following districts:

R-2A, Two Acre Residential and Farming District

NSC, Neighborhood Shopping Center District

* * * * * * * * * *

322. *Neighborhood Shopping Center District*

322.1 *Permitted Principal Uses:*

a. Stores and shops for the conduct of retail sales and personal service uses of a local convenience character.

b. Banks, business, professional, and civic offices.

c. Restaurants and other food service establishments where customers are served only when seated within an enclosed building. Such uses, however, may include a food take-out service incidental to the primary permitted use.

d. Automotive service stations, as defined in Section 610, provided that any such station is located in a place approved by the Commission as not interfering with the normal operation of

the balance of the Neighborhood Shopping Center District development, or the movement of pedestrian and vehicular traffic thereto and therefrom.

322.2 *Permitted Accessory Uses:*

a. Parking and loading space for motor vehicles, in accordance with the requirements of Section 360.

b. Business signs, in accordance with the requirements of Section 350.

c. Exterior lighting, in accordance with the requirements of Section 312.8.

d. Any other use clearly and customarily incident to a permitted principal use.

322.3 *Limitations on Uses:*

a. The total floor space devoted to any single business establishment shall not exceed 7,500 square feet, exclusive of basement area devoted to utilities and storage, and not open to the public.

b. There shall be no exterior storage of articles for sale, or of other materials or equipment, except for a small amount of materials and equipment placed at the gasoline pump, and solely for convenience in serving customers.